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88-7495

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-____

JACK HOWARD POTTS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-____

JACK HOWARD POTTS,	)
Petitioner,	)
v.	)
STATE OF GEORGIA,	)
Respondent.	)

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

The Petitioner, Jack Howard Potts, prays for a writ of certiorari to review the judgment of the Supreme Court of Georgia affirming Petitioner's sentence to death by electrocution. Potts v. State, 376 S.E.2d 851 (Ga. 1989).

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at Potts v. State, 376 S.E.2d 851 (Ga. 1989), and is reprinted in full in *Appendix A, infra*.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 23, 1989. A timely petition for rehearing was denied on March 15, 1989. Mr. Potts, who was without counsel thereafter, moved this Court for an extension of time in which to find counsel and file a petition. He was granted an extension up to, and including, June 13, 1989, and now files a timely petition, invoking this Court's jurisdiction pursuant to *28 U.S.C. § 1257*.

QUESTIONS PRESENTED

Petitioner presented the following questions of general importance to the administration of justice:

1. Whether the Eighth Amendment permits the jury to impose a death sentence premised upon unguided and inaccurate speculation that life imprisonment, the only alternative sentence, will result in parole in seven years?

2. Whether, in a State with very limited pretrial discovery, an indigent capital defendant may be required to disclose his entire theory of defense in order to secure his constitutional right to an independent expert?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, that --

> No person shall . . . be deprived of life . . . without due process of law . . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part, that --

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides, in pertinent part, that --

> Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that --

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person to life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 42-9-39, which is specifically authorized by the Georgia Constitution, provides in pertinent part that:

> (a) The provisions of this Code section shall be binding upon the board in granting pardons and paroles, notwithstanding any other provisions of this article or any other law relating to the powers of the board.
>
> (b) When a person is convicted of murder and sentenced to life imprisonment and such person has previously been incarcerated under a life sentence, such person whall serve at least 25 years in the penitentiary before being granted a pardon and before becoming eligible for parole.
>
> (c) When a person receives consecutive life sentences as the result of offenses occurring in the same series of acts and any one of the

life sentences is imposed for the crime of murder, such person shall serve consecutive ten-year periods for each sentence, up to a maximum of 30 years, before being eligible for parole consideration.

STATEMENT OF THE CASE

Mr. Potts was indicted for the May 8, 1975, murder of Michael Priest. He was tried, convicted and sentenced to death. The Supreme Court of Georgia affirmed, Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978), and this Court denied certiorari.

The Superior Court for Butts County denied his petition for a writ of habeas corpus, and this Court denied his petition for a certificate of probable cause. The United States Court for the Northern District of Georgia granted Mr. Potts habeas corpus relief with respect to penalty, and the grant of relief was affirmed by the Eleventh Circuit. Potts v. Zant, 243 F.Supp. 326 (N.D. Ga. 1980), remanded, 638 F.2d 727 (5th Cir. 1981), cert. denied 454 U.S. 877 (1981), on remand, 575 F.Supp. 374 (N.D. Ga. 1983), aff'd, 734 F.2d 526 (11th Cir. 1984), rehearing denied, 764 F.2d 1370 (1985), vacated, ___ U.S. ___, 106 S.Ct. 3328, 92 L.Ed.2d 734 (1986), on remand sub nom. Potts v. Kemp, 814 F.2d 1512 (11th Cir. 1987).

Upon remand to the Superior Court for Forsyth County, a mistrial was declared due to the impossibility of securing an impartial jury. (V. 29 -- 4115)[1] Upon change of venue to Richmond County, Mr. Potts was retried as to sentence, beginning January 4, 1988. On January 14, 1988, after several hours' of deliberations, the jury sentenced Mr. Potts to death by electrocution. (V. 41 -- 2879) Mr. Potts filed a motion for a new trial, which was heard on April 14, 1988 (V. 42), and denied by the trial court.

The Supreme Court of Georgia affirmed Mr. Potts' sentence of

[1] The record on appeal for Mr. Potts' resentencing consists of forty-two volumes of transcript, and several additional volumes of exhibits introduced into evidence. References to each of the numbered volumes will appear "(V. __ -- ___)". References to unnumbered volumes will appear with the date and page of the volume, or, if this is not specified, other identification.

death. Potts v. State, 376 S.E.2d 851 (Ga. 1989). Since he was without counsel, and owing to the extensive record in his case, Mr. Potts requested an extension of time in which to file his petition for a writ of certiorari to the Supreme Court of Georgia. This Court granted him until June 13, 1989, in which to file his petition.

STATEMENT OF FACTS

Jack Howard Potts was born on January 4, 1945, the third and youngest child. His father -- now deceased -- showed no interest in Mr. Potts, who even as a young child was left largely to fend for himself. As a result, although an affectionate child, Mr. Potts never received the guidance he should have, and went joyriding through north Georgia as early as twelve years old. (V. 40 -- 2614) Soon, as a young teenager without parental control, Mr. Potts began to abuse alcohol (V. 40 -- 2615), and was incarcerated for his resultant delinquency by the time he was sixteen.

During the time he was not imprisoned, Mr. Potts married, and although it was difficult for him to find employment due to his record (V. 40 -- 2622), when he could he worked hard to bring up his children. However, his alcohol and drug addiction took its toll, and at the time of the 1975 crime, he was waking up to drink and abuse drugs. On May 8, 1975, it was hard to understand how Mr. Potts could even stand up, since he and those with him had drunk large quantities of beer and liquor, and done five dozen hits of speed. (V. 40 -- 2638) Immediately prior to the crime for which he was subsequently sentenced to die, Mr. Potts had engaged in a drinking contest with a friend, persisting until she had passed out. (V. 38 -- 2094)

Under these circumstances, the tragic death of Michael Priest occurred. Since that time, Mr. Potts has had more than a decade on Death Row in which to repent his terrible crime, and seek to put his own life in order. Indeed, he has been largely successful in this, no longer abusing and abused by alcohol and drugs. (V. 40 -- 2626)

Over thirteen years after the sad death of Mr. Priest, it is hard to see any civilized purpose to sending Mr. Potts to the electric chair. Indeed, it seems that the jury -- asking the trial court to instruct them on the availability of parole (V. 41 -- 2874) -- reached this senseless verdict solely on the basis of their misguided speculation about the non-existent possibility that Mr. Pot s will ever again be out of prison.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully suggests that this Court should grant the Writ in order to resolve the following questions, each of which is important to the administration of justice in the courts below:

I. IN A CASE WHERE PETITIONER, IF SENTENCED TO LIFE, WOULD CLEARLY NEVER BE RELEASED FROM PRISON, IT IS A FUNDAMENTAL DENIAL OF THE RIGHT TO A FAIR AND RELIABLE SENTENCING PROCEEDING TO PERMIT A JURY TO SPECULATE INACCURATELY THAT PETITIONER WOULD RECEIVE PAROLE IN SEVEN YEARS.

Any way you look at it, Petitioner would never be eligible for parole, should he be sentenced to life imprisonment. With his prior convictions, he would have to serve a mandatory minimum 25 years in Georgia. *See O.C.G.A. § 42-9-39(b).* After being released by Georgia, he would have to serve a mandatory minimum of 25 years in Florida. (V. 8 -- 38) Since he was 30 years old at the time of the offense, he could not possibly be paroled until he was 80, and the likelihood of his being released then is slim to none.

Nevertheless, Mr. Potts was not allowed to explore and correct misperceptions shared by jurors that he would be paroled within seven years. Furthermore, the prosecution went out of the way to mislead the jury as to the availability of parole. As a result, there is a strong probability that the ultimate sentence of death was imposed because of fundamentally unreliable and inaccurate speculation.

A. This issue is very important and has created unending confusion in the Courts below.

Various convincing reasons may be advanced to justify the introduction of accurate information concerning the defendant's ineligibility for parole. Certainly the jury should be accurately informed when making the critical decision between life and death. California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). Certainly, the jury may consider the issue of future dangerousness, Jurek v. Texas, 428 U.S. 262, 96 L.Ed.2d 2950, 49 L.Ed.2d 929 (1976), and, if the prosecution introduces evidence tending to show that he will be a danger, the accused must be permitted to rebut it. Skipper v. South Carolina, 476 U.S. 1, 7 n.1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Certainly, the jury must be permitted to hear any evidence Petitioner seeks to present concerning mitigating circumstances. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).[2]

Petitioner's eligibility or ineligibility for parole draws all these fundamental precepts of Eighth Amendment jurisprudence into play. Since the jury believed that Petitioner would be paroled in seven years, rather than serve the rest of his life in prison, the reliability principle of Ramos was abrogated.[3] Since the prosecution went to great pains to show that Petitioner had committed crimes before, and would commit them again in the future, the principle of Skipper required that Petitioner be permitted an opportunity to demonstrate that he would never again be a free man. Since his lack of future dangerousness was itself an element in mitigation, Lockett requires that the jury be

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[2] There is, additionally, another important principle which impinges on the question of parole eligibilty. During any effective voir dire process, the prejudices of jurors must be explored to determine whether their preconceptions will interfere with a fair determination of sentence. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986).

[3] If a juror is so convinced of the "seven year rule" that he or she states on voir dire that it is impossible to keep the issue out of the sentencing equation, regardless of the trial court's instructions, Turner requires that juror's exclusion for cause.

permitted to consider it.

Despite the clarity of these principles, the lower courts have got into a thorough muddle with respect to the issue of parole. See, generally, *Paduano & Stafford Smith, Deathly Errors: Juror Misperceptions Concerning Parole*, 18 Colum. Hum. Rts. L. Rev. 211 (1987)(hereinafter *Juror Misperceptions Concerning Parole*)

In this case, the Georgia Supreme Court has held that the defendant cannot question jurors on their prejudices concerning parole, Potts v. State, 376 S.E.2d at 856, nor correct those prejudices at the penalty phase. Id. at 856-57. Only if the jurors ask a question may the issue be addressed, and then only by telling them to ignore it. Quick v. State, 256 Ga. 780, 353 S.E.2d 497 (1987).

A fragmented Fifth Circuit has decided also that the accused may not voir dire jurors on their prejudices concerning parole. King v. Lynaugh, 850 F.2d 1055 (5th Cir. 1988) (en banc). The same court has held that the refusal to correct jurors' misperceptions concerning parole raises no constitutional concerns. O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), cert. denied, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984).

In contrast, the Maryland Court of Appeals has decided that Skipper v. South Carolina requires admission of evidence on lack of parole eligibility. Doering v. State, 545 A.2d 1281, 1295 (Md. 1988). The Mississippi Supreme Court, which once prohibited such evidence, Gilliard v. State, 428 So.2d 576 (Miss. 1983), has now decided that this Court's recent pronouncements require its admission. Davis v. State, 512 So.2d 1291, 1293 (Miss. 1987). See also, State v. Matthews, 373 S.E.2d 587, 592 (S.C. 1988) (no prejudice from failure to charge jury on ineligibility for parole, since statute restricting eligibility inapplicable to the case). Other states run the gamut of possibilities, allowing certain discussions of the parole issue, and prohibiting others. See, generally, *Juror Misperceptions Concerning Parole, at 214-*

B. The issue is thoroughly preserved for review.

Prior to trial, Mr. Potts proffered evidence on the common belief in this state that parole is available on a life sentence in approximately seven years. (V. 22 -- 1683) This is strongly supported by a recent study on the issue. See *Juror Misperceptions Concerning Parole*, supra. Justice Weltner of the Georgia Supreme Court has also expressed this opinion, based on his years as a trial judge:

> "I'm sure [the option of 20 to 25 years parole ineligibility] would lower the number of death penalties that are given," Georgia Supreme Court [Justice] Charles Weltner said. "Everybody believes that a person sentenced to life for murder will be walking the streets in seven years."

Id. at 213 n. 4 (quoting *Savannah News-Press*, Mar. 23, 1986, at 7C, col. 2).

During pre-trial hearings (V. 8 -- 38, 12 -- 418-20, 22 -- 1678 et seq.), and prior to voir dire in Forsyth County, and in Richmond County (See, e.g., V. 30 -- 91), Mr. Potts requested permission to voir dire jurors on their attitudes to parole.[4] Through this questioning, Mr. Potts sought to determine whether anyone's view of the inevitability of parole was so strong that they would not be able to put it aside. Although certain misperceptions concerning parole became apparent during other voir dire questioning,[5] the trial court refused to permit exploration of this most critical issue.

Since he would, in any event, not become eligible for parole until after his eightieth birthday, Mr. Potts agreed never to seek parole even then. His request to present this evidence to the jury was denied.

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[4] Mr. Potts sought permission to ask such questions as "what the term 'life imprisonment' means", see *Defense Proposed Penalty Phase Voir Dire Questions*, No. 74, or whether they "believe[d] that a life sentence [was] harsh enough for a person convicted of murder." Id. No. 50; See also id. No. 54.

[5] Pertinent extracts from the voir dire of the jurors are set forth as *Exhibit B* to this petition.

During their deliberations, the jury came back with a question:

> We would like to know if given a life sentence, would he be eligible for parole at a later time.

(V. 41 -- 2874) The judge proposed, and ultimately gave, an instruction that the jury should ignore parole. The defense objected, asking for an instruction stating that Mr. Potts would not be paroled. The prosecutor objected, stating that Mr. Potts would be swiftly paroled, and any statement to the contrary "flies in the face of reality that we all recognize," (V. 41 -- 2875) (emphasis supplied), presumably also recognized by the jury.

a. The Voir Dire Issue: Identifying Misperceptions.

Just as Justice Weltner, the District Attorney, and the commentators acknowledge, certain venirepersons called for duty will admit an opinion concerning parole which is unshakable, even when the judge instructs them to ignore parole. Indeed, in this case some spontaneously announced that they believed Mr. Potts would be paroled within seven years, and that they would not be able to put their opinions aside even if instructed to do so by the judge. See, generally, *Exhibit B*.

Limits on voir dire that create an unreasonable risk of bias or prejudice infecting the trial process violate the constitutional right to a fair sentencing proceeding. Turner v. Murray. The general rule is that "the trial court abuses its discretion in voir dire when the parties are denied the right to some surface information about prospective jurors which might furnish a basis for challenge." United States v. Brown, 799 F.2d 134, 136 n. 3 (4th Cir. 1986) (citing, United States v. Baldwin, 607 F.2d 1295, 1297 (9th Cir. 1979)("Discretion is not properly exercised if the questions are not reasonably sufficient to test the jury for bias or partiality")).

This rule has been applied to require an opportunity to voir dire on various issues which might bear on the defendant's

challenges, whether peremptorily or for cause. For example, the accused in a capital case must be permitted to determine whether, after a finding of guilt, a juror will consider mitigating circumstances, rather than automatically opting for death. See, e.g., Patterson v. Commonwealth, 283 S.E.2d 212 (Va. 1981); Pierce v. State, 604 S.W.2d 185 (1980); State v. Henry, 198 So. 910, 915 (La. 1940); Stroud v. United States, 251 U.S. 15, 20-21 (1919). If the juror refuses to follow the trial judge's instructions in this regard, he or she must be struck for cause. See, e.g., Pope v. State, 256 Ga. 196, 345 S.E.2d 831 (1986); Thomas v. State, 403 So.2d 371 (Fla. 1981);

Conversely, if a person's ability to follow the juror's oath is substantially impaired by opposition to the death penalty, he or she must similarly be struck for cause. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); Wainwright v. Witt, 469 U.S. 810, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

Equally, a juror who refuses to follow the trial judge's instruction to disregard the possibility of parole must also be struck for cause. If this is so, necessarily the defense must be permitted to ask the questions which will expose this bias.

b. The Other Issues: Correcting Misperceptions.

If Mr. Potts had been sentenced to life imprisonment, the Georgia Constitution would have precluded the Parole Board from even opening a file on Mr. Potts for 25 years. See O.C.G.A. Section 42-9-39 (1985). In the highly improbable circumstance that Mr. Potts were actually paroled then, he would have been sent to Florida to begin serving a life sentence without eligibility for at least 25 years, so he could not have been considered for parole until he was at least eighty years old. If he did not leave the prison dead, therefore, he would come out of the prison and into the old people's home. Facing this reality, Mr. Potts was willing to enter a contract stating that he would never even seek parole. (V. 15 -- 616)

This information was, of course, highly relevant to the jury's decision, and the defense moved to introduce evidence to prove it. (V. 12 -- 418) The District Attorney resisted this motion, understanding well that the evidence would dramatically reduce the likelihood of a death sentence. However, he did concede in another context that the jury has the right to receive accurate information regarding future dangerousness, arguing:

> [In Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), the] Supreme Court of the United States observed that any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. * * * [I]t would be the State's position that the duty of those twelve people on the jury outweigh any interest that . . . the Parole Board may have.

(V. 19 -- 1126) However, the trial court disagreed and refused to permit any evidence on Mr. Potts' lack of eligibility for parole.

With life itself at stake, this Court has long emphasized that it is "essential that the jury have all possible information" in making their decision. Jurek v. Texas, 428 U.S. 262, 276, 96 L.Ed.2d 2950, 49 L.Ed.2d 929 (1976)(emphasis supplied). It would seem difficult to dispute that the lack of parole eligibility -- the accused's lack of potential for committing future violent acts upon society -- is one fact which is critical to the jury's evaluation of future dangerousness, and whether the individual should die.[6]

It is equally clear that the jury should consider reliable information regarding future parole. In the balance between

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[6] The availability of life imprisonment without the possibility of parole (LWOP) as an alternative sentence to the death penalty is probably the single most important factor in the determination whether the accused should live or die. A study in a Georgia capital case showed that 67.5 percent of jurors would be less likely to impose a death sentence if given assurances that the accused would not get out of prison for a long time, even if there were no actual LWOP alternative. *Juror Misperceptions Concerning Parole at 221-24.* A recent statewide study in Florida demonstrated that 54 percent of those in favor of the death penalty would be less likely to impose it in an individual case if apprised of the LWOP alternative. See Cambridge Survey Research, Attitudes in the State of Florida on the Death Penalty: A Public Opinion Survey, at 34 (Washington, 1986).

life and death, the "fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special '"need for reliability in the determination that death is the appropriate punishment"' in any capital case." Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. 1981, 100 L.Ed.2d 575, 584 (1988) (quoting, Gardner v. Florida, 430 U.S. 349, 363-64, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (quoting, Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)(White, J., concurring))).

There is an intolerable probability that Jack Potts was sentenced to die not because the jurors believed he deserved death in an objective sense, but because they misguidedly believed that the only alternative sentence was for him to spend seven years in prison prior to parole. This Court should grant certiorari, and resolve the critical issues presented by this inequity.

II. THE FAILURE TO PERMIT EX PARTE APPLICATIONS FOR FUNDS DEPRIVED MR. POTTS OF HIS RIGHTS SECURED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court should use Petitioner's case as the vehicle to clarify an issue which has been a source of constant confusion in the courts below: Whether the decision in Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), requires that an indigent defendant be permitted to apply for state funds on an ex parte basis, or whether Mr. Potts could rightfully be forced to disclose his entire defense strategy in order to secure his constitutional right to funds.

A. The Procedural Posture of this Issue.

Mr. Potts made continued motions for permission to proceed ex parte on his applications for funds, both for experts[7] and for out-of-state witnesses.[8] The trial court first admitted to

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[7] See, e.g., V. 5 -- 90, 5 -- 114, 6 -- 131, 7 -- 176, 9 -- 158, 9 -- 159, 10 -- 167, 10 -- 187, 10 -- 197, 10 -- 240.

[8] See, e.g., V. 12 -- 408, 12 -- 412, 14 -- 506.

not knowing what ex parte meant (V. 6 -- 160, 14 -- 510), later thought it meant the same as "in chambers" (V. 10 -- 243), and ultimately concluded that such hearings were not required (V. 6 -- 163), ordering that everything should be served on the district attorney. (V. 10 -- 243) The Court ruled that if Mr. Potts did not want to disclose something to the prosecution, "then I suppose that would be your decision whether or not to include that in the motion." (V. 10 -- 244) It turned out that the prosecutor had been applying for out of state witnesses on an ex parte basis. (V. 14 -- 554)

On appeal, Mr. Potts claimed that he ought to have been permitted to make his showing of need ex parte when applying for funds for experts. See *Brief on Appeal, Enumeration of Error II, at 9 et seq.* The Supreme Court of Georgia denied relief, simply holding

> The trial court did not abuse its discretion as to the defendant's requests . . . .

Potts v. State, 376 S.E.2d at 855.

B. Conflicting decisions on the right to make ex parte applications for funds.

By having advance notice of defense witnesses -- at the point when the defense wished only to consult potential witnesses, rather than make a final decision as to whether to call them -- the prosecution was able to achieve an unfair advantage, both directly against Mr. Potts in his own case, and in comparison to a similarly situated defendant of means, who would not have been required to make any such disclosures. In Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), this Court ruled that the indigent defendant must be permitted "to make an ex parte threshold showing to the trial court" concerning the need for funds. Id., 84 L.Ed.2d at 66 (emphasis supplied).

The need to hold such hearings ex parte is obvious, particularly in a state like Georgia, where the accused's right to pre-trial discovery is so limited. See, e.g., Hartley v.

State, 159 Ga. App. 157, 282 S.E.2d 684, 688 n. 1 (1981). A defendant has no right to access to copies of police reports, O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838, 843 (1985), or non-exculpatory witness statements. Griffin v. State, 168 Ga. App. 696, 310 S.E.2d 278, 281 (1983). Similarly, if a defendant cannot have access to the state's work product, Mercer v. State, 169 Ga. App. 723, 314 S.E.2d 729, 734 (1984), the constitution must protect the defense from having to expose the work product which may be produced in the preparation of the potential defense expert witnesses:

> [T]he Due Process Clause . . . forbids enforcement of [discovery] rules unless reciprocal rights are given to criminal defendants.

Wardius v. Oregon, 412 U.S. 470, 472, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973).

If it is important that defense counsel have the opportunity fully to consult with an independent expert, it is obviously critical that the expert be available to answer questions in an atmosphere of confidentiality. This has long been recognized in federal cases, decided under the *Criminal Justice Act, 18 U.S.C. § 3006(e)(1) (1964)*:

> [The defense] expert fills a different role [from the Court expert]. He supplies the services 'necessary to an adequate defense.' He can be a partisan witness. His conclusions need not be reported in advance of trial to the court or to the prosecution. And his services embrace pretrial and trial assistance to the defense as well as potential trial testimony.

United States v. Bass, 477 F.2d 723, 725-26 (9th Cir. 1973); in accord, United States v. Sloan, 776 F.2d 926 (10th Cir. 1985); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); United States v. Theriault, 440 F.2d 713 (5th Cir. 1973) (Wisdom, J., concurring); see also United States v. Tate, 419 F.2d 131, 132 (6th Cir. 1969). The Georgia Supreme Court has used similar language to describe the right to an independent defense expert under federal constitutional law. See, e.g., Lindsey v. State, 330 S.E.2d 563, 566-67 (Ga. 1985).

If the expert is independent, surely the prosecution cannot have a right to hear all the privileged defense reasons for wishing to consult with the expert. The Georgia Supreme Court held that the prosecution should have such a right. In contrast, in federal cases, the courts have long held that when the denial of ex parte hearings forces the defendant to disclose not only the names but also the substance of the expert's testimony, it produces an unconstitutional result: "a premature disclosure of [the defense] case." Marshall v. United States, 423 F.2d 1315, 1318 (10th Cir. 1970); see also, Gather v. United States, 391 A.2d 1364 (D.C.App. 1978); United States v. Sutton, 464 F.2d 552, 553 (5th Cir. 1972).

Defining the showing of need required to invoke the federal constitutional right to independent experts, other States have similarly concluded that "[t]he intention of the majority of the Ake Court that such hearings be held ex parte is manifest . . ." McGregor v. State, 733 P.2d 416 (Okla.Ct.Crim.App. 1987); cf. Wall v. State, 289 Ark. 570, 715 S.W.2d 208, 209 (1986); State v. Hickey, 346 S.E.2d 646, 654 (N.C. 1986); State v. Poulsen, 45 Wash.App. 706, 726 P.2d 1036, 1038 (1986).

This Court should resolve this critical question, and clarify the indigent accused's right to make such presentations on an ex parte basis.

Respectfully Submitted,
JACK HOWARD POTTS

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APPENDIX A

APPENDIX.

Moon v. State, 258 Ga. 748, 375 S.E.2d 442 (1988); *Lee v. State*, 258 Ga. 82, 365 S.E.2d 99 (1988); *Harrison v. State*, 257 Ga. 528, 361 S.E.2d 149 (1987); *Childs v. State*, 257 Ga. 243, 357 S.E.2d 48 (1987); *Hicks v. State*, 256 Ga. 715, 352 S.E.2d 762 (1987); *Cook v. State*, 255 Ga. 565, 340 S.E.2d 843 (1986); *Beck v. State*, 255 Ga. 483, 340 S.E.2d 9 (1986); *Walker v. State*, 254 Ga. 149, 327 S.E.2d 475 (1985); *Ingram v. State*, 253 Ga. 622, 323 S.E.2d 801 (1984); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984); *Roberts v. State*, 252 Ga. 227, 314 S.E.2d 83 (1984); *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983); *Jones v. State*, 249 Ga. 605, 293 S.E.2d 708 (1982); *Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685 (1982); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1981); *Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980); *Tucker v. State*, 245 Ga. 68, 263 S.E.2d 109 (1980); *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907 (1979); *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977); *Young v. State*, 237 Ga. 852, 230 S.E.2d 287 (1976); *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261 (1976); *Spencer v. State*, 236 Ga. 697, 224 S.E.2d 910 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Goodwin v. State*, 236 Ga. 339, 223 S.E.2d 703 (1976); *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Moore v. State*, 233 Ga. 86, 213 S.E.2d 829 (1975).

POTTS
v.
The STATE.
No. 45977.
Supreme Court of Georgia.
Feb. 23, 1989.

Defendant was convicted of murder and was sentenced to death by the Superior Court, Forsyth County, Pope, J., and defendant appealed. The Supreme Court, Bowles, J., 241 Ga. 67, 243 S.E.2d 510, affirmed. Thereafter, the United States District Court for the Northern District of Georgia, 492 F.Supp. 326, dismissed federal habeas petition and appeal was taken. The Court of Appeals, 638 F.2d 727, affirmed in part, vacated and remanded in part and denied rehearing, 642 F.2d 1210. The District Court, 575 F.Supp. 374, granted relief. On appeal, the Court of Appeals, 734 F.2d 528, affirmed. On remand for retrial as to sentence, defendant was again sentenced to death by the Superior Court, Richmond County, Richard S. Gault, J., and defendant again appealed. The Supreme Court, Smith, J., held that: (1) requirement that defendant be manacled and arrangements made for concealing manacles from jury were appropriate; (2) evidence of defendant's ineligibility for parole if given life sentence was properly admitted; and (3) admission of evidence that murder victim begged for his life on behalf of himself and his family did not violate *Booth v. Maryland*.

Affirmed.

1. Criminal Law ⇐173

Upon remand for resentencing trial, grant of defendant's motion for change of venue before oath was administered to jury did not bar retrial on double jeopardy grounds; jeopardy did not attach as jury was not sworn. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇐637

Shackling of defendant during trial on murder charges was justifiable; defendant had threatened to disrupt proceeding, to throw things at judge, to assault district attorney, and take his own attorney hostage to escape, thus mandating security measures, and further, both counsel tables were draped in such a fashion that legs and feet of those seated at tables were not visible to jurors.

3. Jury ⇐33(2.1)

Death-qualification of prospective jurors is not improper.

4. Constitutional Law ⇐256.2(4)
Jury ⇐33(5.2)

Defendant, who was white male, lacked standing to raise equal protection claim under *Batson* to prosecutor's peremptory challenges of female prospective jurors. U.S.C.A. Const.Amend. 14.

5. Criminal Law ⇐627.8(4)

Trial court's in camera review of defendant's parole file for potentially mitigating evidence was sufficient to satisfy defendant's right of access to mitigating evidence; defendant had access to other, nonconfidential information regarding his behavior in prison.

6. Criminal Law ⇐709(10)

Prosecution did not interfere with defense witness or with defendant's effort to present case in mitigation during sentencing phase of murder trial; prosecutor merely talked to inmate whom defendant intended to call as character witness and was told that defendant had admitted committing other murders for which he had never been prosecuted and thus, defendant decided not to use witness who ultimately did not testify for either side.

7. Homicide ⇐358(1)

It was not error to exclude evidence of defendant's ineligibility for parole if given life sentence during sentencing trial following murder conviction.

8. Criminal Law ⇐768(4)

It is not error to inform resentencing jury that defendant has already been found guilty, and to tell jury that its duty is to determine punishment to be imposed, considering all evidence presented at resentencing trial and all facts and circumstances of case.

9. Homicide ⇐358(1)

State properly proved defendant had committed prior crime, through presentation of evidence and testimony, for purposes of aggravation during resentencing of defendant convicted of murder instead of merely introducing evidence of defendant's guilty plea where defendant claimed plea was not voluntary and where no transcript of plea colloquy could be located.

10. Homicide ⇐358(1)

Statement made by defendant after recapture that he would "give" authorities "some dead bodies" if they would not charge jailer who had furnished defendant with weapon aiding in his escape was admissible during resentencing following conviction of murder, despite defendant's claim that he was merely bragging about things that did not occur; relevance of statement did not turn on proof that defendant actually committed additional murders.

11. Homicide ⇐357(1)

Testimony by hostage as to what defendant's girl friend told her defendant would do to her if she tried to escape was admissible in sentencing stage of murder trial to explain why hostage waited as long as she did to flee. O.C.G.A. § 24-3-2.

12. Homicide ⇐358(1)

Jailer who aided defendant in escape was properly permitted to testify that she had pled guilty and was testifying as part of plea agreement during sentencing phase of murder trial.

13. Homicide ⇐311

It was not improper for trial court to define armed robbery and to state that armed robbery was capital felony in penalty phase of murder trial; jury was clearly instructed that death penalty was sought for offense of murder and offense of armed robbery was alleged contemporaneous capital felony supporting death sentence. O.C.G.A. § 17-10-30(b)(2).

14. Criminal Law ⇐841

Objections to form of verdict must be stated when verdict is returned and cannot be reserved.

15. Homicide ⇐358(1)

Admission of evidence during penalty phase of murder trial to effect that murder victim's wife was pregnant and that victim begged for his life on behalf of himself and his family did not violate prohibition in *Booth v. Maryland* against admission of victim impact statements.

16. Criminal Law ⇐641.5

Attorney whom defendant planned to kidnap during his escape attempt was properly disqualified from representing defendant by court on conflict-of-interest grounds on motion by both State and present lead defense attorney.

17. Criminal Law ⇐1208.1(4)

Defendant was not entitled to have death penalty set aside based on fact that he was held on death row 13 years, retried, and then would be held for certain period prior to actual execution.

Michael Mears, McCurdy & Candler, Decatur, for Jack Howard Potts.

Rafe Banks, III, Dist. Atty., Cumming, Michael J. Bowers, Atty. Gen., for the State.

SMITH, Justice.

This is a death penalty case. Jack Howard Potts originally was convicted and sentenced to death in Forsyth County for the murder of Michael Priest. *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978). His death sentence for murder was set aside during federal habeas corpus proceedings, *Potts v. Zant*, 734 F.2d 526 (11th Cir.1984), and the case was remanded to Forsyth County for a retrial as to sentence. Potts' motion for change of venue was granted, and the penalty phase was retried in Richmond County. Potts was resentenced to death. He now appeals.[1]

FACTS

The evidence presented at the resentencing trial may be summarized as follows:

In the spring of 1975, Potts met 22-year-old Norma Blackwell. She left her husband and three children, and began living with Potts. In early May, 1975, they were in Daytona Beach, Florida. While there, Potts killed a man. Blackwell helped Potts bury his bloody shirt and they returned to Georgia. (Potts later confessed to this murder.)

Potts and Blackwell spent the night of May 7, 1975 in Forsyth County. The next day, after Potts shot a window out of his mother's car (because "he was upset"), Gene Snyder and Elaine Glase stopped by in Snyder's pickup truck. Blackwell and Potts sought a ride with them to Marietta where Potts had left his automobile. As the four of them rode to Marietta, Potts, who was driving, reached across the seat and shot Snyder.

Snyder testified:

> [I heard] a sound like a firecracker going off in my ear, and I shook my head and wondered what happened, and I turned around and looked, and he had a gun in his hand, and I seen blood run down my shirt, and I figured then I'd been shot. So, I took the key out of the switch and ... the truck slowed down ... I told him to take me to the doctor ... and he said he would if I'd put the key back in the switch.
>
> So, I should have knowed better, but I did put the key back in the switch, and then he shot me again right through the sinus and down in the throat somewhere....
>
> [The first shot] went through my sideburn ... and came out [my] right ear....

The voir dire examination began in Forsyth County on November 8, 1987. The trial court granted the defendant's motion for change of venue on November 16, 1987. Trial was recommenced in Richmond County on January 4, 1988, culminating in a verdict on January 14, 1988. A motion for new trial as to sentence was filed February 15, 1988, and amended April 14, 1988. The motion, as amended, was heard on April 14, 1988, and denied May 2, 1988. A notice of appeal was duly filed, and the case was docketed in this court July 6, 1988. Oral arguments were heard October 11, 1988.

1. Potts originally was convicted not only of the murder of Michael Priest in Forsyth County, but also of kidnapping Priest in Cobb County. The Cobb County conviction was set aside in the same federal proceedings which granted relief as to sentence in the Forsyth case. *Potts v. Zant*, supra, 734 F.2d 526. There have since been interlocutory appeals in both the Forsyth and the Cobb County cases. *See Potts v. State*, 258 Ga. 430, 369 S.E.2d 746 (1988), and *Potts v. State*, 257 Ga. 402, 359 S.E.2d 916 (1987). Only the Forsyth case is involved in this appeal.

[After the second shot], I tried to hold his head, and ... he either hit me or his gun went off again....

Snyder pretended to pass out. As Potts came around the truck (now stopped) to pull him out, Snyder took the ignition key out of the switch and threw it out of the window. Potts left Snyder by the side of the road and wiped down the inside of the truck to erase any fingerprints.

Potts walked to a nearby house, where Michael Priest, his pregnant wife, and her parents had just begun to eat supper. Potts, covered with blood, claimed he had been in an accident and needed a ride. Michael Priest volunteered to take him to a hospital.

While Potts was gone, Elaine Glaze asked Norma Blackwell if she could just leave. Blackwell told her that Potts would kill her if she left; Blackwell had seen him kill before, in Florida.

Potts returned with Priest in the latter's car. Priest saw Snyder "covered in blood" and stated, "My God, that man is hurt. Somebody needs to help him." Potts pointed a gun at him and told Priest he had done it and would "do" Priest "like that." The two women entered the car, and Potts ordered Priest to drive off.

Glaze testified:

Michael, he kept saying that he had a wife and baby and a baby on the way. That he didn't want to die. Over and over. That he would do anything, and he would give him anything if he just didn't hurt him. And it went on like that for awhile.

And Michael ... started saying, "Oh, God, don't hurt me because I haven't done anything to you." And that's when [Potts] told him, "You'd better pray to me. I'm your God." And Michael began to pray to him.

They stopped on a dirt road. Potts took Priest into some high weeds, forced him to his knees, and shot him in the back of the head. He returned to the truck, and, according to Glaze,

said, "Now it's your turn. Come on." And I was begging to Norma [Blackwell], and Norma said, "Don't hurt her Jack. Don't kill her. She'll do anything you want to." And ... I said, "I will." And he laughed and got in the front seat and began to drive....

After changing clothes and burning their old ones, the three drove to Cummings, where Potts stole a dealer "tag" to replace the license plate on Priest's car. They disposed of Priest's personal possessions and papers, and drove toward Florida.

They stopped to pick up a hitchhiker, but when Potts told him they were going "to hell and back," the hitchhiker decided not to ride with them.

Glaze escaped when Potts stopped to get a motel room. When Potts returned to the car and discovered Glaze was gone, he and Blackwell drove on, spending the night in the car. The next morning, they picked up two hitchhikers. As they drove south, Potts bragged that he had killed a man the day before.

They were spotted near Morgan, Georgia, by police Officer Rickey Weaver, who had received information over his radio that Potts had been driving recklessly. Weaver directed him to stop, but Potts refused. As Weaver chased Potts, he received another call on the radio informing him that the driver was wanted in connection with a murder in North Georgia.

Potts stopped his car and got out. According to Blackwell, Potts intended to shoot Weaver until he saw that the officer was armed with a shotgun. Officer Weaver testified that he stepped out of his car carrying his shotgun and told Potts to lie face down on the ground. Instead, Potts got back into his car and sped off.

Weaver chased Potts for several miles. As he topped a hill, Potts, who had stopped again, fired several shots at Weaver. Weaver stopped his car and fired at Potts, who took off again. Weaver resumed the chase, but soon had to quit because Potts had shot a hole in his radiator and his car overheated.

Potts and his companions broke into a farmhouse, stole some guns and ammunition, and were preparing to steal a car when two more policemen drove up. In the ensuing shootout, Potts and one of the policemen were wounded, and one of the hitchhikers was killed.

Potts was taken into custody, where he remained for 12 years. On September 19, 1987, while awaiting a retrial in this case, Potts broke out of the Forsyth County jail, using a gun furnished him by a 21-year-old female jailer who thought "he was a friend." After a shootout, Potts was apprehended not far from the jail. The sentencing trial took place three and one-half months later.

ENUMERATIONS OF ERROR

1. This court affirmed the denial of Potts' double jeopardy claim based on prosecutorial misconduct at the original trial. *Potts v. State*, 257 Ga. 402, 359 S.E.2d 916 (1987). Following the return of the case to superior court, a jury was selected in Forsyth County for the resentencing trial. However, the trial court granted Potts' motion for a change of venue before the oath was administered to the jury. See OCGA § 15-12-139. Thereafter, Potts again sought to bar a retrial on double jeopardy grounds, claiming now that the grant of his motion for a change of venue was "tantamount to declaring a mistrial."

[1] The trial court granted Potts' motion for change of venue after determining that Potts could not get a fair trial in Forsyth County. Since the jury was not sworn, jeopardy did not attach, and there was neither a mistrial, nor anything "tantamount" to a mistrial. *Shaw v. State*, 239 Ga. 690(1), 238 S.E.2d 434 (1977). Hence, Potts' double jeopardy claim is without merit. Moreover, although we need not decide whether the court would have been justified in granting a change of venue even if jeopardy *had* attached, we note that the change of venue was granted at the defendant's request, and that "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution...." *United States v. Jorn*, 400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971).

2. The trial court did not abuse its discretion as to the defendant's requests for expert assistance. *Crawford v. State*, 257 Ga. 681(5), 362 S.E.2d 201 (1987).

[2] 3. Before trial, Potts filed a motion asking that he not be manacled in the presence of the jury. The court stated that it had asked the sheriff "to submit his proposal for security during the trial of this case, and we will reserve ruling on that particular motion until he's done that."

The sheriff's plan, as submitted, included shackling Potts with leg irons during the trial (his hands, however, would remain free). At the defendant's request, the trial court conducted a hearing on the issue.

The state presented evidence that Potts had threatened to disrupt the proceedings, to throw things at the judge, and to assault the district attorney. The sheriff testified that Potts had "severe mood swings." He had fired his lawyer three or four times in the previous week. He had torn his clothes and flushed them down the commode. He had "set the jail on fire," and the sheriff had to remove all flammable objects from his cell. Potts had obtained a gun and attempted an escape not long before trial. Moreover, Potts' original escape plan had been to use the gun to take his own attorney hostage.[2]

The court noted that "both counsel tables in the courtroom including the one occupied by the state and the one occupied by the defense have been draped or covered in such a way that the feet and legs of those seated at those tables are not visible to the jurors." In addition, the court stated that Potts would be brought into the courtroom before the jury entered, and would stay until the jury left. The court found from the evidence presented that shackling was justified and that "the use of alternative restraints" would not satisfactorily assure

2. Evidence of Potts' plan to take his attorney hostage was presented at an earlier hearing in which an issue was raised about the attorney's conflict of interest. At the hearing on shackling, the court stated: "We have already heard considerable evidence on other motions in this case that I think bears on [the shackling] question."

"courtroom security [or] the personal security of Mr. Potts and security personnel," nor assure Potts' continued presence at trial.

There was no error. *Hicks v. State*, 256 Ga. 715(9), 352 S.E.2d 762 (1987). Compare *Moon v. State*, 258 Ga. 748(12)(b), 375 S.E. 2d 442 (1988).

4. The court did not err by failing to excuse two prospective jurors who saw the defendant in handcuffs outside the courtroom where one of the prospective jurors was not challenged by the defendant, and both prospective jurors testified that what they observed would not affect their fairness and impartiality. Cf. *Ford v. State*, 257 Ga. 461(5), 360 S.E.2d 258 (1987).

5. There was no improper restriction in the scope of the six-day-long voir dire examination. *Childs v. State*, 257 Ga. 243(6), 357 S.E.2d 48 (1987). See *King v. Lynaugh*, 850 F.2d 1055 (5th Cir.1988).

[3] 6. Death-qualification of prospective jurors is not improper. *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). The trial court's death-qualification rulings meet the standards of *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), and *Pope v. State*, 256 Ga. 195(7e), 345 S.E.2d 831 (1986).

[4] 7. Potts is a white male, and therefore lacks standing to raise an equal-protection claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), to the prosecutor's peremptory challenges of female prospective jurors.[3] *Skipper v. State*, 257 Ga. 802(5), 364 S.E.2d 835 (1988).

8. The record does not show that the state failed to disclose exculpatory information. On the contrary, the state opened its files to the defendant. Cf. *Reed v. State*, 249 Ga. 52(3), 287 S.E.2d 205 (1982).

9. Potts objected to the introduction of statements made by him as he was attempting to break out of jail, relying on the notice provisions of OCGA § 17-7-210. The trial court sustained the defendant's objection to the introduction of the statements and granted the defendant's request to instruct the jury to disregard the statements. Potts made no motion for mistrial after the curative instructions were given. Pretermitting whether the statements at issue here come within the purview of OCGA § 17-7-210, since the trial court granted all the relief Potts asked for at trial, he now has nothing to complain about. *Jarrells v. State*, 258 Ga. 833 (5b), 375 S.E.2d 842 (1989).

[5] 10. The trial court obtained the defendant's parole file and reviewed it in camera for potentially mitigating evidence. Potts argues this action was insufficient to satisfy his right of access to mitigating evidence. We disagree. A defendant has access to other, non-confidential information about his behavior in prison, and we do not find it necessary to ignore the confidentiality provisions of OCGA § 42-9-53 in order to satisfy the defendant's right to present mitigating evidence. *Pope v. State*, supra, 256 Ga. 195(22), 345 S.E.2d 831.

[6] 11. Potts planned to call a fellow inmate to testify in mitigation concerning Potts' character. The prosecutor talked to the inmate before trial and was told by the inmate that Potts had admitted committing other murders for which he had never been prosecuted. The defense discovered this before calling the inmate as a witness, and decided not to use the witness, who ultimately did not testify for either side.

That the witness was untrustworthy was not the state's fault. There was no improper prosecutorial interference with a defense witness or with the defendant's effort to present a case in mitigation. Cf. *Ross v. State*, 254 Ga. 22(4), 326 S.E.2d 194 (1985); *Mincey v. State*, 251 Ga. 255(16), 304 S.E. 2d 882 (1983).

[7] 12. It was not error to exclude evidence of Potts' ineligibility for parole if given a life sentence. *Horton v. State*, 249 Ga. 871(4), 295 S.E.2d 281 (1982). See also *Quick v. State*, 256 Ga. 780(9), 353 S.E.2d 497 (1987).

13. As we stated in *Alderman v. State*, 254 Ga. 206, 210(8), 327 S.E.2d 168 (1985):

> When a case is retried as to sentence, both the state and the defendant are entitled to offer evidence on the issue of guilt or innocence, not because the validity of the conviction is at issue, but because the jury needs to examine the circumstances of the offense (as well as any aspect of the defendant's character or prior record) in order to decide intelligently the question of punishment.

[8] It is not error to inform the resentencing jury that the defendant has already been found guilty, and to tell the jury that its duty is to determine the punishment to be imposed, considering "all of the evidence" presented at the resentencing trial, and "all of the facts and circumstances of the case." Transcript, Vol. 41 at 2851, 2857-59. See *Alderman v. State*, supra at 212 (11b), 327 S.E.2d 168.

[9] 14. Potts complains of the state's use of a prior conviction for murder based on a guilty plea that was not shown to be voluntary. See *Pope v. State*, supra, 256 Ga. 195(17), 345 S.E.2d 831 (holding that "once the defendant raises the issue of intelligent and voluntary waiver with respect to prior guilty pleas, the burden is on the state to establish a valid waiver").

Potts raised before trial the issue of intelligent and voluntary waiver as to his 1975 Florida guilty plea. The state responded by announcing that because no transcript of the plea colloquy could be located, and the attorneys involved had no independent recollection of the plea proceedings, the state would not introduce the guilty plea or the conviction based thereon. Instead, the state offered the testimony of witnesses from Florida to prove the commission of the offense.

The state did not use a prior conviction in aggravation; it proved the commission of the crime itself, with evidence and testimony (including Potts' confession). It was not error to do so. *Devier v. State*, 253 Ga. 604(9), 323 S.E.2d 160 (1984); *Jefferson v. State*, 256 Ga. 821, 827(8b), 353 S.E.2d 468 (1987). See also, e.g., *Richardson v. Johnson*, 864 F.2d 1536(V) (11th Cir.1989).

[10] 15. After being recaptured, Potts sought to help the jailer who had furnished him a weapon by offering to "give" the authorities "some dead bodies" if they would "cut [her] loose." Potts objected to the introduction of this statement at trial on voluntariness grounds. That objection was unsuccessful, and he now argues that the statement should have been excluded because it fails to establish the commission by Potts of other murders. It was, he contends, mere "bragging" about "things that never occurred."

Potts' present objection was not timely raised at trial. We note, however, that the relevance of the statement did not turn on proof that Potts actually committed additional murders. See *Frazier v. State*, 257 Ga. 690, 701(21), 362 S.E.2d 351 (1987).

[11] 16. Testimony by Elaine Glaze to what Norma Blackwell told her Potts would do to her if she tried to escape was admissible to explain why Glaze waited as long as she did to flee. OCGA § 24-3-2. Blackwell's reference to a murder in Florida was cumulative to other evidence establishing that Potts committed murder in Florida. *Gaskins v. State*, 250 Ga. 386, 297 S.E.2d 729 (1982).

[12] 17. Potts did not object to testimony by the jailer who assisted his escape attempt. However, it was not improper, as Potts now contends it was, for her to testify that she had pled guilty and was testifying as part of a plea agreement. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

18. The record supports the trial court's findings on the admissibility of Potts' confession to the Florida murder. See *Parks v. State*, 254 Ga. 408(1), 330 S.E.2d 686 (1985). The confession was properly admitted in evidence.

19. There was no error in the admission of crime-scene photographs. *Hicks v. State*, 256 Ga. 715(13), 352 S.E.2d 762 (1987).

3. Because Potts lacks standing to raise the issue, we need not decide whether peremptory challenges based on sex are addressable under *Batson*.

20. The trial court's instructions on credibility of witnesses and reasonable doubt were not erroneous. *Felker v. State*, 252 Ga. 351(13c), 314 S.E.2d 621 (1984).

[13] The trial court did not err by defining armed robbery and by stating that armed robbery is a capital felony. OCGA § 17-10-30(b)(2); *Putman v. State*, 251 Ga. 605(13), 308 S.E.2d 145 (1983). The jury was clearly instructed that the death penalty was sought for the offense of *murder* and that the offense of armed robbery was an alleged contemporaneous capital felony that would support a death sentence for murder.

The court's instructions on mitigating circumstances were sufficient. *Romine v. State*, 251 Ga. 208(10b), 305 S.E.2d 93 (1983). See also *Davis v. State*, 255 Ga. 598(22), 340 S.E.2d 869 (1986); *Ford v. State*, 257 Ga. 461(2), 360 S.E.2d 258 (1987).

The court did not err by telling the jury its verdict must be unanimous. *Romine v. State*, 256 Ga. 521, 525, 350 S.E.2d 446 (1986).

21. The trial court did not abuse its discretion by allowing jurors to take notes.

[14] 22. Objections to the form of the verdict must be stated when the verdict is returned; they cannot be "reserved." *Romine v. State*, supra, 251 Ga. 208(7), 305 S.E.2d 93. Absent any objection to the form of the verdict, the trial court did not err by failing to require the jury "to amend its written verdict to reflect more precisely its intent." Ibid.

The evidence supports the jury's finding that the offense of murder was committed while the defendant was engaged in the commission of the armed robberies of Gene Snyder and Michael Priest. OCGA § 17-10-30(b)(2); OCGA § 17-10-35(c)(2).

[15] 23. Items discarded from Priest's vehicle by the defendant were properly introduced in evidence. Evidence that Priest's wife was pregnant and that Priest had begged for his life on behalf of himself and the family he would leave behind did not violate *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). See *Kinsman v. State*, — Ga. —(10), 376 S.E.2d 845 (1989); *Holiday v. State*, 258 Ga. 393(11f), 369 S.E.2d 241 (1988).

24. Any impropriety in the state's closing argument was cured when the trial court sustained the defendant's objection and gave curative instructions to the jury to disregard any reference to a third person possibly involved in the Florida murder.

25. Potts contends the prosecutor was guilty of misconduct when he used prior statements to refresh the memories of some of his own witnesses. This contention is without merit. *Davis v. State*, 249 Ga. 309(3), 290 S.E.2d 273 (1982).

Nor do we find misconduct in the prosecutor's opening statement or closing argument.

26. Our death penalty procedures are not unconstitutional for any reason alleged.

[16] 27. The attorney whom the defendant planned to kidnap during his escape attempt was disqualified by the court on conflict-of-interest grounds from representing Potts, on motion by both the state and the (present) lead defense attorney. The trial court did not err by granting relief sought by both sides.

The trial court did not err by failing to excuse sua sponte two other attorneys representing Potts (neither of them his lead attorney), one of whom was an ex-prosecutor and the other of whom was a former judicial law assistant, where neither had worked on the case previously. Compare *Pope v. State*, 257 Ga. 32(3), 354 S.E.2d 429 (1987).

28. The trial court did not deny Potts his right to represent himself. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Although Potts stated at a pretrial hearing that he wished to represent himself, he withdrew his request after the trial court gave him time to reconsider and reflect on the consequences of self-representation.

29. Potts has not shown that he could not get a fair trial in Richmond County. Compare *Devier v. State*, supra, 253 Ga. 604(4), 323 S.E.2d 150.

30. The trial court did not err by refusing to consider Potts' challenge to the Forsyth County grand jury which returned the indictment. "Because his conviction long since has been affirmed, this challenge comes too late." *Blankenship v. State*, 258 Ga. 43, 45(5b), 365 S.E.2d 265 (1988). The challenge to the Richmond County traverse jury was properly denied. *Hicks v. State*, 256 Ga. 715(7), 352 S.E.2d 762 (1987).

31. "A criminal defendant is not entitled to a daily transcript." *Rutledge v. State*, 245 Ga. 768, 772, 267 S.E.2d 199 (1980).

32. Nothing in the Unified Appeal Procedure forces a defendant to give up any constitutional rights or compels him to speak. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981).

33. Potts was granted funds to employ a private psychiatrist. He raised no contention of incompetence, and the trial court did not err by refusing to order a competence hearing sua sponte. Compare *Baker v. State*, 250 Ga. 187, 297 S.E.2d 9 (1982).

34. Potts' motion to recuse the trial judge was properly denied. *Smith v. State*, 250 Ga. 438(1), 298 S.E.2d 482 (1983); *Hunnicutt v. Hunnicutt*, 248 Ga. 516(1), 283 S.E.2d 891 (1981).

[17] 35. Potts argues that it "violates contemporary norms of decency" to hold him "on death row for 13 years, then retry him, and then hold him for who-knows-how-long prior to actually executing him...." Appellant's brief at p. 120. If Potts means by this assertion that his death penalty should be set aside, we disagree.

> The "waiting for execution is intolerably cruel" argument is ... gossamer.... [T]erminally ill cancer patients suffer that fate, quite innocently.... [T]he fact that innocent people serve out a "death sentence" imposed by disease is important for two reasons. In the first place the condition is far from unusual; cruel it may be, but unusual it is not. It is a fortunate adult who has not been touched by or at least been aware of such a death. In the second place, this grief is visited capriciously upon the general population, young and old. Although the condition was not imposed by the state as punishment for murder, the innocent victims nevertheless experience the emotional and mental grief of anticipated death. Many of them also endure physical pain and debility, suffering which is not imposed by the state upon convicted murderers. Thus, although waiting for death can be cruel, it is hardly out of the ordinary run of human experience.
>
> All real punishment imposes pain of some kind and awaiting death doubtlessly imposes mental pain upon those to be executed.... Much of the general public views condemned killers with indifference, if not with fear and loathing. Who among the general public is upset about the fact that killers suffer emotional grief awaiting execution? Few indeed, I would judge. The many people who deem the death penalty to be just deserts are not morally offended that the condemned are impelled to focus their minds upon the unknown fate that awaits them.

Little, *Another View*, U. of Fla.L.Rev., Vol XXXVI, 200, 201-02 (Spring 1984).

36. The sentence of death was not imposed under the influence of impermissible passion, prejudice, or other arbitrary factor. OCGA § 17-10-35(c)(1).

37. Potts' death sentence is neither excessive nor disproportionate to sentences imposed in similar cases, considering both the crime and the defendant. OCGA § 17-10-35(c)(3). The similar cases listed in the Appendix support the death penalty imposed in this case.

JUDGMENT AFFIRMED.

All the Justices concur.

APPENDIX.

Moon v. State, 258 Ga. 748, 375 S.E.2d 442 (1988); *Lee v. State*, 258 Ga. 82, 365 S.E.2d 99 (1988); *Harrison v. State*, 257 Ga. 528, 361 S.E.2d 149 (1987); *Beck v.*

APPENDIX—Continued

State, 255 Ga. 483, 340 S.E.2d 9 (1986); *Ingram v. State*, 253 Ga. 622, 323 S.E.2d 801 (1984); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984); *Roberts v. State*, 252 Ga. 227, 314 S.E.2d 83 (1984); *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983); *Jones v. State*, 249 Ga. 605, 293 S.E.2d 708 (1982); *Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685 (1982); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1981); *Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980); *Tucker v. State*, 245 Ga. 68, 263 S.E.2d 109 (1980); *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907 (1979); *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977); *Young v. State*, 237 Ga. 852, 230 S.E.2d 287 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Goodwin v. State*, 236 Ga. 339, 223 S.E.2d 703 (1976); *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975).

EASLEY

v.

CLEMENT.

No. 46878.

Supreme Court of Georgia.

March 2, 1989.

Action was brought alleging malicious use of process and violations of statutes relating to suits brought without substantial justification and for purposes of harassment. The Superior Court, DeKalb County, Jonathan C. Peters, J., granted defendant's motion for summary judgment, and plaintiff appealed. The Court of Appeals, 187 Ga.App. 799, 371 S.E.2d 416, affirmed in part and reversed in part, and petition for certiorari was granted. The Supreme Court, Clarke, P.J., held that attorney fees for defending against prior action are not available under statute relating to suits brought without substantial justification, and only attorney fees and expenses that can be recovered are those incurred in prosecuting second action.

Affirmed in part and reversed in part.

Malicious Prosecution ⇐67, 77

Attorney fees for defending against an action are not available in subsequent suit brought by defendant for malicious use of process; only attorney fees and expenses that can be recovered in subsequent malicious use of process proceeding are those incurred in prosecuting second action. O.C.G.A. § 13-6-11.

James W. McKenzie, Jr., Duluth, for Easley.

Donald I. Anderson, Tucker, for Clement.

CLARKE, Presiding Justice.

In 1985, Bruce Clement sued Charles Easley for breach of warranties relating to the sale of an airplane. Judgment was entered in favor of Easley in June 1986, before the effective date of OCGA § 9-15-14 and five days after the decision *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414 (1986). Then in October, 1987, Easley filed suit against Clement alleging malicious use of process, violations of OCGA § 9-15-14, and § 13-6-11. The trial court granted summary judgment in favor of Clement.

In *Easley v. Clement*, 187 Ga.App. 799, 371 S.E.2d 416 (1988), the Court of Appeals held that Easley was not required to have asserted his claim for malicious use of process as a compulsory counterclaim in the initial suit because OCGA § 9-15-14 was not effective at the time of that action and because Easley could not realistically have asserted a *Yost* claim since *Yost* was announced only 5 days before judgment was entered. We affirm this portion of the Court of Appeals opinion. We also affirm the portions of the Court of Appeals opinion that hold that summary judgment

APPENDIX B

The following extracts from the voir dire in this case illustrate the statements made, sua sponte by the venirepersons, concerning the probability that Petitioner would swiftly be paroled should he be sentenced to life imprisonment:

The trial court asked a question which was designed to root out those who would automatically vote for death rather than life:

> THE COURT: Do you favor capital punishment so strongly that you would refuse to consider mercy for the Defendant, regardless of the evidence and the instructions of the Court?

(V. 22 -- 1845) Certain jurors, all of whom were being questioned out of the presence of the others, misunderstood this question.

> MS. ECHOLS: Well, I want to say that it depends on what the life sentence -- if he could get paroled, how many years it'd be before parole that he could be out free for the safety of the family. That's the way I look at it.
>
> Now, if he's going to be allowed parole, then I would strongly go for the death penalty. But, then I want to say like she did with the Bible. I don't want to be the judgment of nobody. I want the Lord to be. That's for sure. But, depending on what the sentence is when it's a life sentence. I would go either way, but it depends on the life sentence. If he's going to be allowed parole for taking another person's life, then I would not.

(V. 22 -- 1845-46) Ms. Echols was honest enough to admit that she was not going to presume that Mr. Potts would never be paroled when she -- albeit in this case erroneously -- thought he would be:

> THE COURT: Well, if the Court instructs you that the issue of parole is not one that you can consider in deciding this case, can you tell us whether or not you are irrevocably committed before the trial has begun on the issue of punishment to vote for the penalty of death, regardless of the instructions of the Court?
>
> MS. ECHOLS: Well, then I'd have to go for the death penalty and just pray ot the good Lord that he'd forgive me.
>
> THE COURT: All right. . . .

(Id.) Later on, Ms. Echols reiterated her refusal to follow the trial court's instructions on this matter:

> A. . . . . I would want to make sure that the punishment was either life without parole -- but I think the Judge does -- I know that . . .
>
> Q. No, ma'am, you make that decision in this case.
>
> A. Well, life without parole?
>
> Q. No, ma'am, there is not life without parole.
>
> A. Okay. All right. Okay, then, so there's be just the death penalty. Okay. But, like I said, I do not favor that as strong as I would just life sentencing.
>
> * * *
>
> Q. . . . . if you were selected on the jury, do you believe you would be able to, as you put it, weigh it all out, and to determine whether the appropriate sentence was life, or whether it was death?
>
> A. No, because I've already heard that the life is . . . with parole, and that right there makes me against the life. So, knowing what the law is, I could not.
>
> Q. All right, thank you.

(V. 22 -- 1907, 1913)

Ms. Echols was not alone, as her views were echoed by Ms. Ingram. Again, Ms. Ingram spontaneously voiced her concerns regarding parole:

> [DISTRICT ATTORNEY BANKS:] The jury's function in this case will be to determine the appropriate sentence for the offense of murder. The jury's options will be life imprisonment or the death penalty, one or the other.
>
> * * *
>
> A. When you say 'life imprisonment', does that mean until he is dead he will stay in prison, or will he be eligible for parole in a few years or something?

(V. 23 -- 1984) The trial court sought her assurance that she would not take such considerations into account:

> THE COURT: Ms. Ingram, the question of parole is not one that you should be concerned with in your consideration of this case. If you don't feel you could decide this case without consideration of that question, then you should express that feeling. But, I would instruct you that the question of parole is

> not . . . a question that you should concern yourself with unless you feel that would prevent you from being a fair and impartial juror.

(Id.) However, Ms. Ingram admitted that she would not be able to make a presumption that she viewed as so fundamental and so untrue:

> MS. INGRAM: Well, I'm afraid I couldn't be a very fair juror.
>
> (Questioning resumed by Mr. Banks)
>
> Q. Bearing in mind what Judge Gault has just told you and if you were selected on the jury in this case, could you make the conscious decision to set aside personal feelings and follow what the Judge instructs you the law is, and follow those instructions as you sit as a juror?
>
> A. No.
>
> Q. Putting aside --
>
> A. (Interposing) No, I couldn't.
>
> Q. Okay.

(V. 23 -- 1984-85)

Ms. Castleberry was of the same opinion. As the prosecutor noted, she had previously sworn that she would consider both life and death as punishments. However, when asked by the defense:

> Q. Would you consider the possibility of imposing a life imprisonment sentence on someone who had been convicted of murder?
>
> A. You're fixing to open a can of worms, but if . . . a life sentence is life, I have problems dealing with that because so many times a life sentence doesn't turn out to be a life sentence.
>
> Q. If the Court were to instruct you that you were not to concern yourself with . . . those types of concerns, that that wasn't your job in this case, do you think you could listen to those instructions by the Judge and put that out of your mind and not worry about that at all when you're considering what punishment to impose for someone convicted of murder?
>
> MR. BANKS: Objection. If it pleases the Court, the . . . juror has been previously asked whether she would consider both life and death as alternatives in the case, and my recollection is that she testified that she would.
>
> THE COURT: Restate the question, Mr.

Jackson.

(Questioning resumed by Mr. Jackson)

Q. Considering the fact that you have some problems with what a life sentence means, if the Judge were to instruct you that you're not to concern yourself with what the meaning of a life sentence is and that was not to enter your mind, do you think you could put those concerns out of your mind completely in deciding whether to impose the death penalty or a life sentence on someone convicted of murder?

A. Can I go ahead and answer?

Q. (Counsel nods head affirmatively.)

A. No.

(V. 26 -- 3422)

Finally, Charles Glanzman stated that, in his opinion, this was probably the view of almost everyone on the jury pool:

A. I also understand that it's the practice to give one or several life sentences that may turn into just five, seven, ten year stints, and I would have to take that into account.

* * *

A. I don't believe I could in good conscience dispose of a sentence as being life in prison if I had reason to believe that life in prison would mean five to seven years.

* * *

[THE COURT:] You had indicated some question about your ability to impose a sentence of life in the event that you thought that that type sentence or that sentence would have some possibility of parole; and I've instructed you that if you are selected to sit on the jury, you would not be allowed to consider the question of parole in making that determination.

A. I guess I'd be predisposed to the death penalty to assure that he did not have an opportunity to come out and do the same thing he attempted to do again.

Q. You feel that you could not set those feelings aside?

A. I don't believe that most people in the community could.

(V. 23 -- 2209, 2211; see also, V. 25 -- 3029; 30 -- 577-78; 30 -- 594-95)

Certificate of Service

I hereby certify that I have this day mailed a copy of the aforegoing document, first class postage pre-paid, to the following:

The Office of the Attorney General,
132 Judicial Building,
Atlanta, Ga. 30334.

This the 13th day of June 1989.